

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY JAMES SPENCER,

Defendant-Appellant.

UNPUBLISHED

May 7, 1999

No. 209647

Kalamazoo Circuit Court

LC No. 93-000359 FC

Before: Bandstra, C.J., and Markey and Talbot, JJ.

PER CURIAM.

Following a second jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, after the victim, Barbara Schmidt, was found murdered in May of 1991. Defendant was sentenced to life imprisonment without parole. He now appeals as of right.

Defendant asserts that the trial court should have granted his motion for directed verdict at his first trial, which ended in a mistrial due to jury deadlock, because the evidence was insufficient to convict him of murder. We need not address this issue. In *People v Thompson*, 424 Mich 118, 134-135; 379 NW2d 49 (1985), our Supreme Court held that “appellate review of the sufficiency of the evidence at a trial which ends in mistrial because of jury deadlock” is not required. In reaching this conclusion, the Court explained that “[t]he general view of a hung jury mistrial has been that it is essentially a nullity and that the subsequent retrial determines a defendant’s guilt or innocence.” *Id.* at 135.

Defendant next argues that the trial court erred in denying his motions for directed verdict at the second trial because insufficient evidence existed to convict him. We disagree. “When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the charged crime were proved beyond a reasonable doubt.” *People v Warren*, 228 Mich App 336, 345; 578 NW2d 692 (1998). “When reviewing a trial court’s ruling on a motion for a directed verdict, this Court tests the validity of the motion by the same standard as the trial court.” *Id.* at 345-346.

The trial court properly denied defendant's motions for directed verdict. In order to convict a defendant of first-degree murder, the prosecutor must prove that the defendant "intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id.* "The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing." *Id.* Circumstantial evidence and reasonable inferences drawn therefrom it may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

During the time frame in which the victim disappeared and the victim's body was found, numerous witnesses testified that defendant was looking for the victim, was upset with her, and indicated that he was going to kill her when he found her. For example, Brenda Burns testified that around the time that the victim disappeared, defendant was looking for the victim because she had taken something from him and that defendant said he was going to choke her when he found her. Further, because an electrical cord and electrical tape had been used to strangle the victim, testimony was elicited from witnesses that defendant had various wires, electrical cords, and electrical tape in his car. For example, Kerry Barrons testified, after viewing a photograph of the electrical cord that was used to kill the victim, that the cord in the photograph was "similar" to those she had seen in defendant's car. Ms. Barrons also testified that defendant told her to lie to the police and that shortly after the victim's death, defendant sent her a letter while she was in jail telling her to "keep quiet."

Several witnesses also testified that defendant had scratches on his face during the time frame in which the victim disappeared and was found murdered. Other evidence revealed that defendant gave conflicting statements to the police regarding whether he had electrical cords in his car and that defendant became "very nervous and upset" when he was told by the police that the electrical tape on the wire ligature that was used to kill the victim was being tested for fingerprints. Shortly after the victim's body was found, defendant also stated: "I told you I was going to kill the Bitch." The victim's body was also found in the vicinity of where defendant had previously smoked crack cocaine.

Although defendant asserts that someone else killed the victim because testimony was presented that indicated that the victim owed a lot of debts, that others were angry with the victim for ripping them off, and that Ed Jackson had been looking for the victim at the time of her disappearance and had been threatening to kill her, the weight of this testimony and the credibility of the witnesses presenting such testimony are left to the trier of fact. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Wolfe*, supra. Further, in viewing the evidence in a light most favorable to the prosecution, we must avoid weighing the proofs and must resolve all conflicts in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant argues that the trial court improperly denied his motion for a new trial because the jury's verdict was against the great weight of the evidence. We disagree. A new trial may be granted

when the substantial rights of a party are materially affected for the reason that the verdict was against the great weight of the evidence. MCR 2.611(A)(1)(e). In determining whether a trial court erred in deciding whether to grant a defendant's motion for a new trial on the basis of a great weight of the evidence argument, our Supreme Court in *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998), has held that "[a] trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." In the instant case, based on the evidence presented in the previous argument, we conclude that the trial court properly denied defendant's motion for a new trial because the evidence did not preponderate heavily against the verdict such that it would be a miscarriage of justice to allow the verdict to stand. *Id.*

Defendant asserts that the trial court abused its discretion in not granting a mistrial after Kerry Barrons, a witness for the prosecution, made reference to a polygraph during her testimony. We disagree. Evidence of a polygraph examination is inadmissible at trial. *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988); *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977). Generally, an unresponsive, volunteered answer that injects improper evidence into a trial is not grounds for mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995); *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). The decision whether to grant a mistrial because of an unresponsive answer rests in the sound discretion of the trial court and that decision will not be disturbed on appeal absent an abuse of that discretion. *People v Coles*, 417 Mich 523, 555; 339 NW2d 440 (1983), overruled in part on other grds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Lumsden*, 168 Mich App 286, 298-299; 423 NW2d 645 (1988).

Defendant relies on *People v Rocha*, 110 Mich App 1; 312 NW2d 657 (1981), to assert his claim that a mistrial should have been granted. In *Rocha*, *supra* at 9, this Court stated that the following factors should be considered to determine whether reversal is mandated when reference is made to a polygraph examination: (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness' credibility; and (5) whether the results of the test were admitted rather than merely stating that a test had been given. Unlike the circumstances in *Rocha*, *supra*, the reference in the present case was inadvertent and brief and was not an attempt to bolster the witness' credibility. Further, as defendant concedes, there was no further reference to the polygraph examination after the initial statement by the witness. In addition, the reference did not indicate whether a polygraph test was actually taken, and the court immediately instructed the jury to disregard the reference to the polygraph test. *People v King*, 215 Mich App 301, 308-309; 544 NW2d 765 (1996). Further, contrary to defendant's argument regarding Detective Ballett being called as the next witness after Barrons, we agree with the trial court that the jury would not necessarily conclude that just because defendant had talked to Ballett that defendant had been given a polygraph test and had failed it. The incident in question is not so egregious that defendant was denied a fair and impartial trial. *Coles*, *supra* at 554-555; *Lumsden*, *supra* at 298. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant asserts that the trial court improperly denied his motion for a mistrial after he was prejudiced by the prosecutor eliciting testimony from Detective Alfred Morris regarding his interview with defendant. We disagree. The trial court's ruling on a motion for a mistrial will not be reversed on appeal absent an abuse of discretion. *Haywood, supra*; *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). A mistrial should be granted only for an irregularity that prejudices the defendant and impairs the defendant's ability to get a fair trial. *Haywood, supra*; see, also, *McAlister, supra* ("[t]he trial court's ruling must be so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice").

The trial court did not abuse its discretion in denying the mistrial. The court recognized the seriousness of the matter, and we agree with the trial court that the jury would not be left wondering regarding what defendant had to say during his interview with Morris because other statements made by defendant to two other police officers, Detective Werkema and Detective Ballett, were admitted at trial. Thus, contrary to defendant's arguments on appeal, the jury would not be left with the impression that defendant "had exercised his right to remain silent" or that defendant "had made a statement that was being hidden from them." Defendant was not denied a fair trial.

Defendant claims that he was denied a fair trial because the prosecutor shifted the burden of proof during rebuttal argument. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *Id.*; *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Further, the prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991).

After evaluating the prosecutor's remarks in context and in light of defense arguments, we conclude that the prosecutor did not shift the burden of proof. During closing argument, defense counsel made statements that the prosecution had failed to present witnesses who should be testifying and corroborating the events in question. After defense counsel concluded his closing argument and after the jury had left the courtroom, the prosecutor objected to defense counsel's statements. After the trial court stated that it had heard nothing improper in defense counsel's closing argument, the prosecutor indicated that he would be responding to defense counsel's statements in his rebuttal. The complained-of remarks made by the prosecutor were clearly in response to previous remarks made by defense counsel. Furthermore, the prosecutor specifically told the jury that defendant had no obligation to present a defense and no obligation to testify. More importantly, during final jury instructions, the trial judge properly instructed the jury that the prosecutor must prove the elements of the crime charged and told the jury that the lawyers' statements and argument were not evidence.

Defendant's argument that the cumulative errors deprived him of a fair trial is without merit. Because no errors were found on any of the above issues, a cumulative effect of errors is incapable of being found. *People v Anderson*, 166 Mich App 455, 473; 421 NW2d 200 (1988).

Defendant claims that his second trial was barred by double jeopardy principles because the trial court improperly declared a mistrial when the jury deadlocked at the first trial. Specifically, defendant asserts that the trial court abused its discretion in declaring a mistrial on the basis of jury deadlock because there was no manifest necessity and defendant did not consent to a mistrial. Defendant also argues that the judge coerced the jury to deadlock in this case. Further, defendant claims that the jury instructions regarding reasonable doubt and circumstantial evidence were inadequate. Defendant's arguments are without merit.

A trial court's decision on whether to grant a mistrial will not be reversed absent an abuse of discretion. *Haywood, supra*; *McAlister, supra*. A trial court's determination of a double jeopardy issue is reviewed de novo on appeal. *People v Peerenboom*, 224 Mich App 195, 199; 568 NW2d 153 (1997); *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). A claim of instructional error is reviewed de novo on appeal. *People v Marsack*, 231 Mich App 364, 379; 586 NW2d 234 (1998); *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

The United States and Michigan Constitutions prohibit a defendant from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997); *People v Echavarria*, 233 Mich App 356, 362; ___ NW2d ___ (1999). When a mistrial is declared, retrial is permissible under double jeopardy principles where (1) manifest necessity required the mistrial, or (2) the defendant consented to the mistrial. *Mehall, supra*; *Echavarria, supra* at 363.

Here, defendant's retrial did not violate double jeopardy principles because the mistrial was properly granted on the basis of manifest necessity. Manifest necessity must be determined on a case-by-case basis. *Echavarria, supra*. "One circumstance that constitutes a manifest necessity is the jury's failure to reach a unanimous verdict." *Mehall, supra*; see, also, *People v Harvey*, 121 Mich App 681, 690; 329 NW2d 456 (1982) (this Court found that the trial court "properly declared a mistrial on the basis of manifest necessity when the jury was unable to reach a verdict"). If the trial court declares a mistrial because the jury has failed to reach a unanimous verdict, a retrial is not precluded because the original jeopardy has not been terminated. *Mehall, supra* at 4-5.

The jury in the present case had informed the trial court on two occasions that it was deadlocked and could not reach a verdict. The jury had already deliberated seven days over a three-week time period. At the conclusion of the sixth day of deliberations on September 10, 1993, Friday, the jury informed the trial court that it was "at an impasse." The court sent the jury home, and on Monday morning, September 13, 1993, the court instructed the jury to continue deliberations. The court instructed the jury in accordance with CJI2d 3.12, the deadlocked jury instruction. A few hours later, one of the jurors informed the court that her father was extremely ill. After discussing options with the parties, the trial court ordered the jury to continue deliberating after defense counsel requested continued deliberations. After about two more hours, the court instructed the jury to determine whether it believed that it could reach a verdict, or whether it was so hopelessly deadlocked that no additional time of deliberating would be helpful. After another hour, the jury again stated that it could not reach a verdict. The court declared a mistrial, stating that it was doing so "very, very reluctantly." Based on the

above facts, manifest necessity required a mistrial, and the trial court did not abuse its discretion in declaring a mistrial.

Defendant's argument that the trial court coerced the jury to deadlock in this case is without merit. With regard to jury instructions, we review instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). "Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* Further, jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Claims of coerced verdicts are reviewed on a case-by-case basis, and all the facts and circumstances, as well as the particular language used by the trial court, must be considered. *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989).

Defendant complains that the trial court coerced the jury by telling them that if they were hopelessly deadlocked, then the court would probably declare a mistrial and another jury could be brought in some other time to try the case over. Reading the instructions as a whole and considering the judge's particular language in context, there is "no significant possibility that the jury found the instruction to be unduly coercive." *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995). The judge's statements were not threatening or harsh, and the court was merely trying to determine if the jury was hopelessly deadlocked.

To the extent that defendant is relying on *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974), in claiming that the trial court deviated from giving CJI2d 3.11, the jury instruction on deliberations and verdict, and CJI2d 3.12, the instruction on deadlocked juries, this argument is without merit. The court gave these instructions without deviation prior to giving the complained-of instruction. Further, contrary to defendant's assertion that the trial judge failed to question the jurors "collectively or individually" to determine whether there was a reasonable probability of reaching a verdict, the trial court specifically asked the foreperson of the jury after many deliberations and instructions regarding the jury's probability of reaching a verdict and whether the jury was deadlocked, and the foreperson replied, "Yes, Your Honor."

With respect to defendant's assertion that the instructions regarding reasonable doubt and circumstantial evidence were inadequate, this assertion is without merit. The trial court's instructions to the jury mirrored CJI2d 3.2 on reasonable doubt and CJI2d 4.3 on circumstantial evidence. The reasonable doubt instruction given by the trial court leaves no doubt that the jury understood what constituted a reasonable doubt. *Hubbard, supra* at 487. Further, as pointed out by the prosecutor, CJI2d 4.3 is considered appropriate in a case like this one that involves circumstantial evidence. See *Marsack, supra* at 379. The instructions fairly presented the issue to be tried and sufficiently protected defendant's rights. *Daniel, supra*.

Defendant argues that he was denied his constitutional right to an impartial jury drawn from a fair cross section of the community where only one African-American juror served on his jury and where only three or four African-Americans were in his particular jury array. This argument is without merit. The trial court's decision regarding whether to grant or deny a motion for a new trial is reviewed

for an abuse of discretion. *Hubbard, supra* at 472. Issues regarding systematic exclusion of minorities from jury venires are reviewed de novo by this Court. *Id.*

Although a defendant is entitled to an impartial jury drawn from a fair cross section of the community, US Const, Am VI, the defendant is not entitled to a petit jury that exactly mirrors the community. *People v Howard*, 226 Mich App 528, 532-533; 575 NW2d 16 (1997); *Hubbard, supra*. To establish a prima facie violation of the fair cross-section requirement, a defendant must show “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *Hubbard, supra* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Here, defendant adopts the evidence that was presented in *Hubbard* and uses this evidence to support his claim that a violation of the fair cross-section requirement occurred in his case. However, the juror allocation process was changed in Kalamazoo County in July 1992 and defendant’s trial was not held until November, 1993. Thus, this evidence is irrelevant to defendant’s claim. As correctly stated by the prosecutor, evidence for defendant’s case “must be derived from juror allocation processes employed **after** July, 1992.” Contrary to defendant’s argument that African-Americans were underrepresented in his particular jury array, “he presented no evidence concerning the representation of African-Americans on jury venires in general.” *Howard, supra* at 533. “Merely showing one case of alleged underrepresentation does not rise to a ‘general’ underrepresentation that is required for establishing a prima facie case.” *Id.*

In addition, defendant has not shown that the alleged underrepresentation was due to systematic exclusion, “i.e., an exclusion resulting from some circumstance inherent in the particular jury selection process used.” *Id.*; *Hubbard, supra* at 481. “A systematic exclusion is not shown by one or two incidents of a venire being disproportionate.” *Hubbard, supra*. As correctly stated by the trial court in its opinion and order denying defendant’s motion for a new trial, defendant’s argument of systematic exclusion is not fact specific to the particular jury selection process used in Kalamazoo County, but rather the argument is directed against the Michigan statutory jury selection system.

In Michigan, juries are “chosen from a source list consisting of the names of county residents at least eighteen years of age drawn from the Secretary of State’s driver’s license and personal identification cardholder lists.” *Id.* at 469; MCL 600.1300; MSA 27A.1300, MCL 600.1304; MSA 27A.1304, MCL 600.1310(4); MSA 27A.1310(4). Defendant’s criticisms of the Secretary of State’s master jury list are without merit. In making his systematic exclusion argument, defendant criticizes the Secretary of State’s master jury list by stating that (1) the master list omits jurors who do not have driver’s licenses or identification cards, and (2) the master list omits “an overwhelming amount” of qualified jurors from the city of Kalamazoo (where the majority of residents are African-American) because these residents have mail “delivery” centered outside the city limits of Kalamazoo.

With regard to defendant’s first assertion, he argues that many of the African-Americans who are residents of the city of Kalamazoo do not have driver’s licenses because they have never applied or

have had their driver's licenses suspended. However, even if this is true, this does not prevent these particular city residents from getting a personal identification card pursuant to MCL 28.291; MSA 4.480(1). Defendant does not explain why he believes that the African-American residents in the city of Kalamazoo do not have personal identification cards. Further, defendant's argument regarding city residents having mail delivery outside the city limits is unsupported and extremely speculative. Defendant fails to recognize that the Secretary of State's source list does not identify prospective jurors by race. *Hubbard, supra*. Because the state has done nothing to exclude African-Americans from getting driver's licenses and identification cards and because race is not a characteristic of the random selection of venirespersons from driver's license lists and personal identification lists, there is no systematic exclusion of the group in the jury selection process. See *People v Guy*, 121 Mich App 592, 600; 329 NW2d 435 (1982); *People v Sanders*, 58 Mich App 512, 515; 228 NW2d 439 (1975); *People v Bell Williams*, 50 Mich App 763, 768; 213 NW2d 754 (1973); *People v Robinson*, 41 Mich App 259, 262-263; 199 NW2d 878 (1972). Defendant's arguments that the statutory procedure itself systematically excludes African-Americans is without merit.

Defendant claims that he was denied a fair trial because his case was the subject of pervasive pretrial and trial publicity. Defendant argues that the trial court abused its discretion by failing to conduct a sufficiently probing voir dire to uncover potential juror bias. Defendant concedes that the trial court questioned the jury regarding pretrial publicity in order to uncover bias; however, defendant claims that the voir dire examination was insufficient. According to defendant, he was tried and convicted in the news media, especially the local newspaper, and the trial court should have questioned the jurors about the newspaper articles. Defendant's assertions are without merit.

Defendant failed to properly preserve this issue for our review because he did not object and raise this issue before the trial court below nor did he request a change of venue. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); see *People v Lee*, 212 Mich App 228, 252; 537 NW2d 233 (1995) (defendant requests a change of venue because of pervasive publicity). In any event, defendant was not denied a fair trial because sufficient probing of the jurors was conducted during voir dire. "Juror exposure to . . . newspaper accounts of the crime for which [the defendant] has been charged does not in itself establish a presumption that a defendant has been deprived of a fair trial by virtue of pretrial publicity. 'To resolve [such a] case,' a reviewing court 'must turn . . . to any indications in the totality of circumstances that [the defendant's] trial was not fundamentally fair.'" *People v Jendrzewski*, 455 Mich 495, 502; 566 NW2d 530 (1997), quoting *Murphy v Florida*, 421 US 794, 799; 95 S Ct 2031; 44 L Ed 2d 589 (1975).

Reviewing the record and considering the totality of the circumstances, we find this case similar to *Jendrzewski, supra* at 497, where our Supreme Court held that the defendant was not denied a fair trial based on pretrial publicity. "After an initial group voir dire, a thorough and probing sequestered voir dire to uncover potential juror bias was conducted with each prospective juror by the court and by trial counsel" *Id.* For example, outside the presence of the other potential jurors, the court consistently and separately asked each potential juror what he or she had heard about the case, from what source the information was obtained, and the effect of the information on the potential juror.

Thereafter, the prosecutor and defense counsel were allowed to question the potential jurors about the publicity surrounding the case.

In addition, there is no merit to defendant's assertion that the trial court should have questioned the jurors about the newspaper articles relating to the crime. As stated above in *Jendrzewski, supra* at 502, juror exposure to newspaper articles relating to the present crime does not in itself establish juror bias. Moreover, defense counsel had an opportunity to conduct individual voir dire to determine the influence of pretrial publicity, including newspaper articles, on each juror. *Jendrzewski, supra* at 499. Further, with regard to defendant's assertion that he was denied a fair trial because of publicity that occurred during the trial, the trial judge repeatedly told the jurors not to read, listen to, or watch any news reports about the case. There is nothing to indicate that these instructions were violated. Defendant was not denied a fair trial because of pervasive pretrial and trial publicity.

Defendant asserts that he was denied a fair trial because the prosecutor unfairly attacked defense witness Angela Burroughs during cross-examination by accusing Burroughs of being an accomplice or accessory to the murder, and the prosecutor moved to have the videotaped testimony of witness Brenda Burns from the first trial admitted at the second trial, which was granted by the trial court, after Burns could not be found.

Defendant failed to object below during the instances in which he claims that prosecutorial misconduct occurred. Appellate review of allegedly improper conduct by the prosecutor is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

With regard to defendant's assertion that the prosecutor unfairly attacked defense witness Burroughs during cross-examination, the record reveals that the complained-of cross-examination by the prosecutor occurred after Ms. Burroughs testified that it was Ed Jackson, and not defendant, who was looking for the victim and wanting to kill her and throw her in the Kalamazoo River. Contrary to defendant's argument, the prosecutor does not specifically state that Ms. Burroughs is an "accomplice" or "accessory." The prosecutor was merely challenging the witness' prior statements, and this questioning was within the scope of cross-examination. MRE 611. Evaluating the prosecutor's statements in light of the defense theory that someone else murdered the victim, the statements were not improper. *Lawton, supra*. In any event, even assuming that the remarks made by the prosecutor were improper, any prejudicial effect could have been cured by a timely instruction. *Rivera, supra*.

Defendant also complains about the videotaped testimony of Brenda Burns, stating that the videotaped testimony could not be impeached. Our review of the record indicates that defendant himself (as well as defense counsel) agreed to the admission of Burns' videotaped testimony. No miscarriage of justice will result with regard to this issue because a defendant cannot assign error on appeal to something he and his counsel deemed proper at trial. *People v Green*, 228 Mich App 684,

691; 580 NW2d 440 (1998). “To do so would allow a defendant to harbor error as an appellate parachute.” *Id.*

Defendant argues that he and his counsel were not present when the thirteenth juror was excused in his trial. Defendant claims that the improper procedure utilized at trial resulted in the only minority juror being released from the panel. Defendant’s assertion is without merit. Defendant has failed to preserve this issue because no objection was made at trial. *Grant, supra*. In any event, the lower court record indicates that the released juror was drawn by lot in open court and that, contrary to defendant’s assertion, defendant and defense counsel were present. There is nothing in the record to indicate that the trial court did anything improper or that it did not comply with MCR 6.411.

We affirm.

/s/ Richard A. Bandstra

/s/ Jane E. Markey

/s/ Michael J. Talbot